IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.308 OF 2005
IN
APPEAL NO.24 OF 2005
IN
NOTICE OF MOTION NO.553 OF 2004
IN
SUIT NO.233 OF 2004

ALONGWITH

NOTICE OF MOTION NO. OF 2005
IN
APPEAL (L) NO.41 OF 2005
IN
NOTICE OF MOTION NO.553 OF 2004
IN
SUIT NO.233 OF 2004

N/M.No.308/04 :
IN
APPEAL NO.24/05:

Severn Trent Water Purification Inc ..Appellant. (Orig.Deft.No.1)

Vs.

Chloro Controls (India) Pvt. Ltd. ..Respondents. (Orig.Plffs. & other Deft.Nos.2 to 11)

Mr.Aspi Chinoy, Sr.Counsel with Ms.Rajani Iyer i/b.Shravan Shah for the Appellants.

Mr.S.H.Doctor, Sr.Counsel with Mr.D.D.Madon i/b.Bachubhai Munim & Co., for the Respondents.

N/M.No. /2005
IN
APPEAL(L) NO.41/05 :

Hi Point Services Pvt. Ltd. ..Appellant
(Orig.Deft.No.4)

Vs.

Chloro Controls (India)
Pvt. Ltd. & Ors. ..Respondents.
(Orig.Plff. &
Deft.Nos.1 to 3 &
5 to 11).

Mr.Fredun Devitre, Sr.Counsel with Mr.Christopher D'Souza i/b.Bhuta & Associates for the Appellants.

Mr.S.H.Doctor, Sr.Counsel with Mr.D.D.Madon i/b.Bachubhai Munim & Co. for the Respondents.

CORAM: A.P.SHAH AND
S.J.VAZIFDAR, JJ.

DATED: 15TH FEBRUARY, 2005

P.C. :

By our order dated 1 Feb 2005 we admitted both the appeals. Considering the consequences and the nature of the reliefs claimed and those granted by the impugned order in the Plaintiff/first Respondent's Notice of Motion, we expedited the hearing of the appeals but expressed our inability to hear them finally immediately. It was submitted however that the prejudice caused by the impugned order in certain respects if not redressed urgently

would render the appeals infructuous. We therefore heard the notices of motion today. This was also necessary as the learned Judge refused to stay the impugned order.

2. Mr.Doctor did not seriously oppose the stay of the order in so far as pending contracts are concerned. It is necessary to refer briefly to the facts which persuaded us to stay the order in certain respects which we did after hearing counsel at considerable length on two occasions.

3. The Appellant in Appeal No.24 of 2005 is Defendant No.1 to the suit. Respondent No.1 is the Plaintiff and Respondent Nos.2 to 11 are Defendant Nos.2 to 11 to the suit. The Appellant in Appeal (lodging) No. 41 of 2005 is Defendant No.4 in the suit. Respondent No.1 is the Plaintiff and Respondent Nos.2 to 11 are Defendant Nos.1 to 3 and 5 to 11 respectively.

4. It would be convenient however to refer to the parties as they are arrayed in the paint. Defendant Nos.1 and 2 are group companies. Defendant Nos.3 and 4 are alleged to be dealing in products of Defendant Nos.1 and 2 and/or their associates thereby inducing a breach of the negative covenants,

sought to be enforced in the suit. Defendant No.5 is a joint venture company wherein the Plaintiffs and Defendant No.2 hold 50 per cent each in the issued equity share capital. Defendant Nos.6 to 11 are directors in Defendant no 5. Defendant Nos.6 to 8 are appointed by Defendant No.2 and Defendant Nos.9 to 11 are appointed by the Plaintiffs.

5. The Plaintiffs/Respondent No.1 in both the appeals, have sought a declaration that a joint-venture agreement and certain other agreements, which we shall shortly refer to, are valid subsisting and binding and that the scope of the business of Defendant No.5 includes the manufacture, sale, distribution and service of the entire range of chlorination equipment, including electro-chlorination equipment, of Defendant Nos.1 and 2, their parents, associates and affiliated companies, as well as of the Kocha family. The Petitioners have sought injunctions restraining the concerned Defendants from violating certain negative covenants in the said agreements by dealing in all electro-chlorination products except through Defendant No.5.

6. Finally, as the said agreements were terminated by Defendant Nos.1 and 2 after the suit was filed,

the Plaintiffs amended the Plaintiff to challenge the said termination and to seek certain consequential reliefs.

7. Defendant No.5 was incorporated on 14 Nov 1995. The Plaintiff was incorporated to hold a 50% shareholding in Defendant no 5. Six related agreements dated 16.11.1995 were entered into between the concerned parties.

The Shareholders Agreement/Joint-venture Agreement was entered into between the Plaintiff and the Defendant no 2. Clauses 1, 4.5 and 21 thereof read as under: --

> "1. Registration of the Company
>
> The parties shall, subject to obtaining all necessary approvals, licenses, and authorizations from the Government of India, register a company with the name "Capital Controls India Private Limited", or if such name is not available for any reason, then with such other name as may be mutually agreed upon by the parties, (hereinafter called the "Company") having as its main object the manufacture, sale and service of the Products (as such term is defined in the Financial Know-How License Agreement between Capital Controls and the Company referred to in Section 14 of this Agreement). The Company's registered office shall be located

in Bombay."

"4.5 Mr.Kocha (and also his wife and sons) and Chioro Controls shall not, during the term of this Agreement, engage, directly or indirectly, or be financially interested in the manufacture, sale or distribution of chlorination equipment and related products which is similar to those manufactured or sold by the Company. During the term of this Agreement, Capital Controls, its parent and its associates will not directly or indirectly engage in or be financially interested in the manufacture, sale, or distribution in India of the products manufactured or sold by the Company."

"21. Term and Termination

21.1 The Agreement shall continue in force and effect for so long as each party, its parents, associates, permitted assigns, shall hold not less than twenty-six percent (26%) of the total paid up equity shares of the Company or in the event that the Company fails to achieve a cumulative sales volume of Rupees 120 million over three (3) years and a cumulative profit of fifteen percent (15%) per year over three (3) years from the signing of this Agreement by both parties, then either party may at its option, terminate this Agreement and dispose of its shares as provided in Section 16.

21.2 In the event of any of the following :

(i) any material breach of this Agreement (other than the payment of money) not

cured or resolved within ninety (90) days after the date of written notice thereof;

(ii) insolvency bankruptcy of either party;

(iii) if either party is unable to pay its debts as they become due, passes a binding resolution for winding up, goes into liquidation or is dissolved, or has a received appointed over any of its assets and undertakings, or makes a composition with its creditors;

(iv) if there is a deadlock regarding the management of the Company which shall remain unresolved for a period of ninety (90) days following written notice thereof from one party to the other;

then the party not in default may terminate this Agreement by notice in writing to the other party.

"21.3 In the event of the termination of this Agreement, the Company will be wound up and all obligations undertaken by Chloro Controls under the Financial and Technical Know-How Agreement or the Trademark Registered User Agreement/Trademark License Agreement or Tradename Agreement

regarding the use of the tradename Capital Controls in the name of the Company shall cease with immediate effect. The name of the Company shall be changed so that the word "Capital" either individually or in combination with any other word or words does not appear in the name of the Company and the said words shall not be used by the Company in any manner in connection with its business."

A Financial and Technical Knowhow License Agreement, also dated 16 Nov 1995 was entered into between Defendant no 5 and Defendant no 2. Clauses 1, 2.4 and 2.5 thereof read as under:

"1. Definitions

1.1 The Term "Products" shall mean Capital Controls chlorination equipment as more fully described in Appendix I attached hereto, and parts and components thereof. The Appendix forms an integral part of this Agreement.

1.2 The term "Technical Know-How" shall mean Capital Controls' secret drawings, designs, formulae and manufacturing procedures and methods and other technical information owned by Capital Controls or in respect of which Capital Controls has the right to disclose and license hereunder, relating to the manufacture, quality control, installation, testing and servicing of the products, existing on the date of this Agreement, and any improvement thereto, but shall not

include any manufacturing data with respect o Appendix II."

"2.4 Licensee agrees that it shall not during the term of this Agreement manufacture or have manufactured for it, sell or offer for sale or be financially interested in any other venture for the manufacture and sale of any goods similar to the Products, without the prior written permission of Capital Controls."

"2.5 During the term of this Agreement, Capital Controls and its affiliated companies shall sell the Products in India only through the Licensee."

8. For the purpose of this order we have proceeded on the basis that the aforesaid agreements read together establish that the joint-venture agreement was also for electro-chlorination equipment as contended by the Plaintiffs. The question that remains is whether, even assuming that this contention is well founded, the Plaintiff is entitled to the reliefs claimed. The answer to this question depends, in the first instance, on a construction of the negative covenants contained in the aforesaid clauses.

9. Mr Doctor, the learned senior counsel appearing on behalf of the Plaintiffs, submitted that all electro-chlorination systems whether manufactured before, at the time of or after the execution of the

aforesaid agreements could not be dealt with in India by the Defendants except through Defendant No.5. He further submitted that this embargo would apply not merely to Defendant No.2 and entities associated with and companies affiliated to it at the time the aforesaid agreements were entered into but even to those entities that were thereafter associated with and became affiliated to Defendant No.2.

10. Mr.Chinoy on the other hand submitted firstly that throughout the agreement, including in clause 4.5, the term products must be given the same meaning as the one attributed to it in clause 1 of the joint-venture agreement. He sought to substantiate this submission in various ways. If this submission is accepted the negative covenant would not apply to electro-chlorination products. We however do not intended expressing any final opinion on this submission at this stage.

11. Mr Chinoy's alternative argument in this respect commends itself to us at least for the purpose of this order. He submitted that the negative covenant contained in clause 4.5 of the joint venture agreement cannot possibly be understood in terms as wide as those suggested by

Mr.Doctor. Clause 4.5 imposes restraints on both the parties. It is pertinent note however that the clause places a restraint on the Plaintiff not merely in respect of chlorination equipment but also in respect of "related products which are similar to those manufactured or sold by the company (Defendant No.5)". In contrast thereto the restraint qua Defendant No.2 is only in respect of the products manufactured or sold by the company and not qua products similar to those manufactured or sold by Defendant No.5. Mr. Doctor's construction of the clause would render the words "and related products which is similar" otiose. The restraints against both parties appear in the same clause. If the intention of the parties was as suggested by Mr.Doctor the obvious thing was for the draughtsman to have used the same language in both the sentences.

12. It is an admitted position that electro-chlorination equipment pertaining to any of the Defendants was at no time dealt with by Defendant No.5 in any manner whatsoever. None of the aforesaid agreements referred to them. It is important to note that Appendix I to the Foreign Collaboration Agreement lists the products manufactured by the joint-venture for chlorine

services only. This Appendix does not include any electro-chlorination equipment. The doubt if any is removed by Appendix II which provides that all products not listed in Exhibit I are products and parts not manufactured by the joint-venture. Thus, if we were to accept Mr Chinoy's submission, which we are inclined to at this stage, it is axiomatic that the negative covenant qua Defendant No.2 will not apply to electro-chlorination products pertaining to them. We however hasten to add that this is only a prima-facie view for the purpose of the above notices of motion. We also hasten to clarify that this view is not related to Mr.Chinoy's submission that the negative covenant in the joint venture agreement must corrospond to the negative covenant in the know how agreement. We express no view on that submission at this stage. This prima-facie view coupled with the facts that we shall now refer to have persuaded us to grant the limited relief by this order.

13. Mr.Devitre, the learned senior counsel appearing on behalf of Defendant No.4, submitted that the Plaintiff is in any event not entitled to any reliefs against Defendant No.4. We agree. In fact the events qua Defendant No.4 also support the construction placed by Mr.Chinoy on the above

clauses containing the negative covenants.

14. As we intend granting certain reliefs in favour of the Defendants in respect of two specific brands of electro-chlorinators namely Omnipure and Sanilec, it is necessary to see their origin and the manner in which the parties hereto have dealt with the same. As we shall presently demonstrate, Defendant Nos.3 and 4 have dealt with these specific products before the incorporation of Defendant No.5, after the incorporation of Defendant No.5 and right up to the date of the filing of the suit without any objection whatsoever from the Plaintiff.

15. Defendant No.4 carried on business as a proprietary concern in 1990. In 1995 it was incorporated in its present form. On 1st Apr 1995 Defendants no 5 was appointed by one Eltech International Corporation as their sales representative for marketing and promoting the sale of their products in India by way of a sales representation agreement including to ONGC and the Defence department. Defendant No.4 has been engaged in sales, packaging, integration, services and maintenance of fire and gas detection and sewage treatment plants namely Omnipure and Sanilec.

16. The suit agreements were entered into on 16th November 1995. On 14th February 1997 Eltech International Corporation was taken over by Excel Technologies International Corporation. Defendant No.4 continued to deal in the said products as it had been doing earlier. In 1998 Exceltec International Corporation was acquired by Severn Trent Services Inc. Defendant No.4 however continued marketing and selling the said products.

17. If the Plaintiffs present contention is justified then this was the time for them to have objected to Defendant No.4 dealing in the said products for by this time the negative, covenant contained in the agreements dated the 16 Nov 1995 had come into operation. The Plaintiff's case is that once the aforesaid companies came within the fold of the group of Defendant Nos.1 and 2 Defendant No.5 was exclusively entitled to deal in the products of such companies including Sanilec and Omnipure. This stand is however contrary to the conduct and the understanding of the Plaintiffs themselves for about six years. There is not a single document on record which even remotely suggests that the Plaintiffs raised any such objection with any of the parties to the suit. Admittedly the Plaintiffs did not address any such

objection to Defendant No.4 directly.

18. Mr.Doctor submitted that the Plaintiffs did raise an objection with Defendants Nos.1 and 2. To substantiate this he invited our attention to item 7 of the minutes of the meeting of the Board of Directors of Defendant No.5 held on 26th September, 2001. At this meeting, Defendant No.9, M.D.Kocha, made a grievance that Exceltec was providing competition between Defendant No.4 and Defendant No.5 by providing technical assistance to Defendant No.4. He stated that the same was not in the right spirit towards Defendant No.5 as there would be competition between two partners of Severn Trent. He, therefore, suggested that Severn Trent should be informed to enable them to take appropriate action/decisions to over-come this situation. He expressed an apprehension that the manufacturing facilities of Defendant No.4 were gearing up and they may pose a serious threat to Defendant No.5.

It is pertinent to note that it was not contended at this meeting that Defendant No.4 was debarred from carrying on the said activities in view of clause 4.5 of the joint venture agreement. Even assuming that such an intention ought to be implied, there is no valid explanation why the suit

was filed after a delay of over three years. This assumes even more significance as, in the plaint, it is alleged that there were several breaches from 1998 itself which suggests that the Plaintiffs contended that they were entitled to object to Defendant No.4 or any of the parties dealing in the said products as a result of the negative covenant contained in the aforesaid agreements.

19. Thus from 1998 to 2001 the Plaintiffs raised no objection of the nature it has now raised in the plaint.

20. In 2001 Severn Trent Services Inc and another company, Groupo De Nora formed a new joint venture company, Severn Trent De Nora. This company is not a party to the suit. It has encompassed the products of Exceltec International Corporation and one De Nora Seaclor S.R.L. and another product Seaclor. It must be clarified at this stage that these are not merely brand names but products technologically different from each other. Even after this Defendant No.4 continued dealing as it did earlier in respect of the said products. Defendant No.4 specifically pleaded that the Plaintiffs were aware of all these facts at all times and that their conduct in not objecting to the

same throughout amounted to acquiescence. It is important to note that in its affidavit in rejoinder the Plaintiffs have not dealt with any of these allegations effectively.

21. In the circumstances we intend staying the operation of the impugned order in so far as the said two products are concerned namely Sanilec and Omnipure.

22. After the suit was filed Defendant Nos.1 and 2 by their fax dated 21st July 2004 terminated the said agreements. The Plaintiffs therefore amended the plaint to challenge the said termination. The learned Judge has observed that a unilateral termination is of no effect. The learned Judge in this view of the matter restrained the Defendants from representing that Defendants No.5 is not affiliated to Severn Trent.

23. The Defendants are entitled under the terms of the agreement to terminate the same in the circumstances mentioned therein. The termination is based on alleged breaches of the said agreements by the Plaintiffs and on the ground that there is a deadlock in the management of Defendants No.5. The Defendants have in fact filed a petition for winding

up Defendant No.5 under section 433 (f) of the Companies Act 1956. It is pertinent to note that the termination itself has not been stayed. It is a moot point whether a termination of this sort can be stayed. Be that as it may we do not see any justification for this part of the order. It is clear that Defendant Nos.1 and 2 do not intend cooperating and giving any further assistance in any manner whatsoever to Defendant No.5. There can be no objection to their informing third parties of their stand in regard to the agreements between the parties. In fact not to permit them to do so and conversely therefore to permit the Plaintiffs to represent to the world that the relationship continues would tantamount to misleading third parties. This is even more important considering the fact that important contracts are entered into with third parties including government agencies such as ONGC and the defence department.

24. In the circumstances the impugned order is stayed in respect of the said two products Sanilec and Omnipure. The impugned order is also stayed in so far as it grants prayer (c) (i) of the Plaintiff's notice of motion. The above notices of motion are accordingly disposed of with no order as to costs.

25. On the application of Mr.Doctor, learned counsel appearing for the Respondents, the operation of this order is stayed for a period of four weeks only in respect of prayer clause (c)(i).